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Who Owns the Bed of Lake Michigan?

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WHO OWNS THE BED OF LAKE MICHIGAN?

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A TITLE to land, especially in this country, is a very mythical thing. We have learned not to investigate back of a certain point when we are examining a title to the so-called "up-land," but if a question arises on title to submerged land, because of the infrequency of such cases, we are inclined to look into the proposition a little farther.

Having represented the City of Milwaukee in a recent case[1] involving the right of the city to fill in about ninety acres in Lake Michigan, under a grant from the legislature, and trade most of this filled in land to a private corporation for some land on the shore, the writer, of necessity, was compelled to "go to the bottom of the proposition." It may be interesting to state ahead of any discussion of the law that an abstract of title to the bottom of Lake Michigan, reading backwards, is about as follows: State of Wisconsin from the United States Government, where it was held in trust at the time of the organization of the Northwest Territory; United States in trust from the State of Virginia; Virginia by private grant from the King of England.

Now the interesting question comes up: Where did the King of England get it? We will support our answer to that question in a moment by some decisions of the supreme court of the United States, but here is the story. Some subjects of the king "discovered" it (although the Indians were here and well organized). These subjects, according to international law, recognized their allegiance to the king. That gave the king of England the title—not only to the upland but to the bed of all navigable water.

Now following the title to the bed of Lake Michigan down from that source it reads as follows: King of England by private grant to Virginia; Virginia in trust to the United States Government, on March 1, 1784, for states to be carved out of the Northwest Territory; eventually Wisconsin was made up of part of this Northwest Territory, and when it came into existence as a state it got the fee simple title to

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City of Milwaukee v. *State of Wisconsin*, 214 N.W. 820; — Wis. ——.

the bed of Lake Michigan, to the middle line thereof, and to all other navigable lakes and rivers within the state. That completed the trust, and the title is a fee.

The very interesting and important case of *Martin* v. *Waddell*,[2] and other cases of its kind, some of which will be mentioned herein, operate as a sort of a quieting title process. The case just mentioned was argued before the Supreme Court of the United States at the January term, 1841, and decided during the January term of 1842. It was an ejectment suit involving 150 acres of land covered by the navigable water in Raritan Bay in the township of Perth Amboy in the State of New Jersey. The defendant claimed under a direct line of grant under the charter granted by Charles II to his brother, the Duke of York. The plaintiff claimed under a title granted by the State of New Jersey more than twenty-five years after the Revolutionary War. In an ejectment suit the plaintiff must win on the strength of his own title and not on the weakness of the defendant's; but both titles are discussed at length in the opinion. As a part of the discussion of the defendant's title the following very interesting quotation appears:

> The English possessions in America were not claimed by right of conquest, but by right of discovery. For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.

Mr. Chief Justice Taney finally disposed of that analysis of the defendant's title by stating:

> We do not propose to meddle with the point.

Speaking of the plaintiff's title the court states:

> For when the Revolution took place the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

The code pleader sees a defect of parties. The Indians were not in the Revolutionary War as far as we have ever been able to find. Nevertheless, this case quieted the title to the land involved, in the State of New Jersey, and since the plaintiff held under grant from the state, the plaintiff won. That was the first case of any importance involving title to submerged land in the Supreme Court of the United

[2] 16 Peters 366.

States. There had been earlier cases in New York growing out of grants in the Hudson River by the State of New York as early as 1807.

In that year in the case of *Jacobson* v. *Fountain,*[3] we find the Supreme Court of the State of New York giving judgment to a plaintiff for $400 damages because the defendant had trespassed upon and fished in waters over land which had been granted to the plaintiff's predecessors.

A similar result happened in 1817 in *Brink et al.* v. *Richtmyer.*[4]

In 1829 in the case of *Lansing* v. *Smith,*[5] we find the Court for the Correction of Errors in the State of New York, being the senate presided over by the chancellor, going fully into the history of the common law and into the strength of a private grant of land under the navigable water in the Hudson River; but it was not until 1842 that the matter really got into the Supreme Court of the United States.

Subsequently, in 1845, in the case of *Pollard et al.* v. *Hagan,*[6] for the first time, a contest was waged in the Supreme Court of the United States to definitely settle whether or not the state or the Federal Government, in fact, had the fee simple title to land submerged under navigable water. In that case the following question was involved:

When Alabama came into the Union in 1818, consisting of land in some ways affected by the Spanish-Florida Treaty and in other ways affected by the Louisiana Treaty with France, did the Federal Government get title to the submerged land in Mobile Bay and retain it, or did the state get the title when it became a member of the Union? It was finally held that Alabama came into the Union on the same footing as the original states, being carved out of land ceded to the United States by Georgia on April 24, 1802, which deed contained the same kind of language that was contained in the deed of cession executed by Virginia, conveying the Northwest Territory land, on March 1, 1784. And then it was held that by these cessions the United States accepted the territory in trust for the new states, and when the new states were organized, the sovereignty, and the soil under the navigable water went to the new states, while the upland was retained by the Federal Government for the purpose of sale to raise revenue for the new Federal Government, which was then practically bankrupt.

The deed of cession by Virginia on March 1, 1784, affecting the entire Northwest Territory, was a conveyance with the following language:

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[3] 2 Johnson, 170.
[4] 14 Johnson, 255.
[5] 4 Wendell, 10, vol. 10, N.Y. Common Law Rep. 513.
[6] 3 Howard, 212.

For the benefit of said states to be formed all right, title and claim as well of soil as of jurisdiction which this commonwealth hath to the territorial tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio . . . .

When Wisconsin adopted her constitution in 1848, in section 2 of article IX she accepted this trust title fully and completely. The section reads as follows:

The title to all lands and other property which have accrued to the territory of Wisconsin by grant, gift, purchase, forfeiture, escheat *or otherwise* shall vest in the State of Wisconsin.

The instrument of cession from Virginia, mentioned above, shows that the Federal Government was to have the right to sell off the upland for the use and benefit of the United States, but that stipulation did not apply to the submerged land.

The same theory and the same law was applied even to the State of California where the title came in from Mexico. The point was first raised in *Webber* v. *The Board of State Harbor Commissioners.*[7] It is pointed out in that case that California came into the Union on an equal footing with the original states. Consequently the title to the submerged land thereby vested, not in the Federal Government, but in the State of California as soon as it became a state. The State of California deeded important parts of the San Francisco Bay to the City of San Francisco, and San Francisco conveyed to private owners.

The leading case on the subject seems to be *Shivley* v. *Bowlby.*[8] That case went to the extreme of holding that the State of Oregon could sell off the submerged land in the Columbia River between the riparian owner and the portion of the stream which was navigable, in fact.

Possibly the most interesting case on the subject is the case of *United States* v. *Mission Rock Company.*[9] It followed the case of *Shivley* v. *Bowlby* in point of time, but the facts are more unique. In San Francisco Bay two stony islands protruded above the surface of the water several feet, although they were not included in the government survey of the upland in the district. Around these islands is considerable shallow water. The State of California deeded the land under this shallow water to a ship building company, the grantor of the defendant in the suit. The ship building company had spent over three hundred thousand dollars in building dry docks and other ship building equipment. On January 3, 1899, President McKinley issued an executive order declaring these islands, which were then known as Mission Rocks, to be reserved for naval purposes. The United

[7] 18 Wall, 57, 21 L. Ed. 798.
[8] 152 U.S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548.
[9] U.S. 392, 47 L. Ed. 865.

States then brought suit against the Mission Rock Company for ejectment and damages. The Supreme Court of the United States held that although the uplands of the islands were not included in the original government survey maps, they nevertheless belonged to the Federal Government, in fact, and that the Federal Government should prevail as to that portion of the lawsuit because it was a physical fact that the land must have been upland at the time of the survey; but that the submerged lands and the land below high water mark had belonged to the State of California in fee and that the state could grant a fee to the grantor of the defendant, and the Federal Government lost the case as to the submerged land.

A similar case is the case of *United States* v. *Chandler-Dunbar Water Power Company*,[10] involving an island in St. Mary's River in Michigan.

The doctrine was repeated in the case of *Scott v. Lattig*, [11] involving an island in the Snake River between Idaho and Oregon, the court holding that the vegetation on the island showed that it must have been there at the time of the survey, although omitted, and must have been upland at that time and consequently did not belong to the abutting owner, but the portion on the Idaho side of the center of the stream could be sold off by the Federal Government because it was upland, while the portion which was clearly underneath the navigable water could be disposed of by the state, subject, of course, to the paramount rights of navigation. The government navigation rights are conclusively waived when the War Department grants a permit for any improvement that may be made upon land that is legitimately conveyed by the states.

A discussion of this kind of title which is vested in the states, and the power of the state to convey, would not be complete without a reference to the case of *Illinois Central Railway Company* v. *Illinois*,[12] and the second appearance of the case in the Supreme Court of the United States at 184 U.S. 77. Anyone familiar with the geography of Chicago will recognize the situation. There was a grant by the State of Illinois of the submerged land along the shore of Lake Michigan, where the Illinois Central tracks are now located and where the Illinois Central depot has been erected. The final outcome of this litigation was that the State of Illinois could make this grant to the railway company, and that the railway company could fill in out to the point of navigation, which was then a seventeen foot depth of water. This case definitely established the "parcel doctrine" in the

[10] 209 U.S. 447, 52 L. Ed. 881.
[11] 227 U.S. 229, 57 L. Ed. 490.
[12] 146 U.S. 387, 13 Sup. Ct. Rep. 110.

United States—that is, a state may grant a parcel of a harbor to private interests and if the Federal Government will grant a permit for construction work the rights of the public are entirely foreclosed. This theory was followed in the Lincoln Park cases litigated through the Illinois Supreme Court, where the filled in land was used, boldly, for park purposes, which are in no way incident to navigation. Several of these park cases have gone to the Supreme Court of Illinois, but none have gone to the Supreme Court of the United States.

It is now clearly established in Wisconsin that the state owns the title under the waters of the lakes and may grant to private persons so long as the grant does not interfere with navigation beyond a point approved by the Federal Government. Mysteriously we have adopted a different doctrine with reference to navigable streams. Without any act of the legislature the Wisconsin Supreme Court holds, since an early date, that the riparian owner holds to the thread of navigable rivers in the state. An interesting problem will arise near the mouth of some river some day where the river tapers into a navigable lake. It will be impossible to follow the title of the abutting owner down the thread of the stream and then watch it disappear into the lake, where the state, undeniably, now, owns the submerged land.

It would be very interesting indeed to see an attempted plat of the ownership along the shore of the Wolf River, then where it tapers into Poygan Lake, and then on down where Poygan Lake narrows into Butte des Morts (which may be a river and may be a lake) and then following on down to where there is undoubtedly a short stretch of Wolf River again, just before we reach Lake Winnebago. It will be especially interesting to take some abutting owner where one of these bodies tapers into the other, and try to figure out the boundary line of ownership on the water side.